

SEP 16 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

BURIEN NISSAN, INC.; DONALD W.
JOHNSON; JACQUE C. JOHNSTON,
Deceased,

Petitioners - Appellants,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent - Appellee.

No. 02-70039

IRS Nos. 9519-98
12341-98
11536-99
16916-99

MEMORANDUM*

Appeal from a Decision of the
United States Tax Court

Argued and Submitted September 9, 2003
Seattle, Washington

Before: THOMPSON, HAWKINS, and BERZON, Circuit Judges.

There was no clear error in the Tax Court's factual findings that: (1) Burien Nissan acquired the covenant not to compete in conjunction with the December 1993 Agreement (thus after the effective date of I.R.C. § 197(a)); (2) the \$45,483 payment

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

to Johnston was compensation for the covenant and not for a promissory note; (3) the \$290,000 payment was income to Johnston notwithstanding any assignment to Don Johnston, Inc.; and (4) the taxpayers failed to take due care to report their income.

Accordingly, we affirm the Tax Court's decision upholding the deficiencies and penalties assessed by the Commissioner in all respects.

AFFIRMED.